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ALEXANDER STEVAS,
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IN THE

Supreme Court of the United States

October Term, 1983

GARY McDONALD,

Petitioner,

vs.

CITY OF WEST BRANCH, MICHIGAN; PAUL LONGSTREET, CHIEF OF POLICE; BERNARD C. OLSON, CITY MANAGER; CHARLES W. JENNINGS, CITY ATTORNEY; DEMETRE J. ELIAS, CITY ATTORNEY; UNITED STEEL WORKERS OF AMERICA, DISTRICT 29,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

I.

SHOULD UNAPPEALED ARBITRATION AWARDS — AS DISTINGUISHED FROM STATE COURT DECISIONS — BE GIVEN PRECLUSIVE EFFECT IN CASES BROUGHT UNDER 42 U.S.C. § 1983?

TABLE OF CONTENTS

Page

Question Presented i

Index of Authorities iii

Statement of the Case 1

Reasons why the Writ should be Denied:

I. PETITIONER'S ARGUMENT IS WITHOUT MERIT BECAUSE PETITIONER'S PROPOSED INTERPRETATION OF 28 U.S.C. § 1738 AND 42 U.S.C. § 1983 CONTRAVENE BOTH PUBLIC POLICY AND THE LEGISLATIVE INTENT OF CONGRESS TO PRECLUDE JUDICIAL REVIEW ABSENT ABUSE OF PROCESS. 2

II. THERE IS NO CONFLICT OF DECISIONS ON THE ISSUE PRESENTED IN THE PETITION. 8

Conclusion 11

INDEX OF AUTHORITIES

Cases:

Alexander v. *Gardner-Denver Co.*, 415 U.S. 36, 94 S. Ct. 1011; 37 L. Ed.2d 147 (1974) 5, 6

Allen v. *McCurry*, 499 U.S. 90, 101 S. Ct. 411 (1980) 2, 3, 10

Fraser v. *Ford Motor Co.*, 364 Mich. 648, 112 N.W.2d 80 (1961) 3

Page

James v. *Board of Education*, 461 F.2d 566 (2d Cir.) *cert. den.*, 409 U.S. 1042 (1972) 9

Kremer v. *Chemical Construction Corp.*, 456 U.S. 461, 102 S. Ct. 1883, *reh. denied*, 103 S. Ct. 20 (1982) 4, 9

McKart v. *United States*, 395 U.S. 185, 89 S. Ct. 1657, 23 L. Ed.2d 194 (1969) 9

Moore v. *Bonner*, 695 F.2d 799 (4th Cir. 1982)..... 9

New Jersey-Philadelphia Presbytery of the Bible Presbyterian Church v. *New Jersey State Board of Higher Education*, 654 F.2d 868 (3d Cir. 1981).. 9

Patsy v. *Florida International University*, 634 F.2d 900 (5th Cir) (en banc), *rev'd on other grounds*, 102 S. Ct. 2557 (1982) 9

Smith v. *Dawes*, 614 F.2d 1069 (5th Cir. 1980)... 7, 8

Stowe v. *Mutual Home Builders Corp.*, 252 Mich. 492, 233 N.W. 391 (1930) 3

Other Authorities:

28 U.S.C. § 1738 ..... 2, 3, 5, 8, 10

39 U.S.C. § 1208 (b) 8

42 U.S.C. § 1983 ..... i, 2, 9

Restatement of the Law of Judgments, 2d, § 27.. 10

Restatement of the Law of Judgments, 2d, § 29.. 10

Restatement of the Law of Judgments, 2d, § 84 (1) 10

U.S. Const. art. IV, § 1 2

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The Respondents, City of West Branch, Michigan; Paul Longstreet, Chief of Police; Bernard C. Olson, City Manager; Charles W. Jennings, City Attorney; Demetre J. Elias, City Attorney; and United Steel Workers of America, District 29, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the order of the United States Court of Appeals for the Sixth Circuit.

STATEMENT OF THE CASE

Respondents accept Petitioner's Statement of the Case.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

PETITIONER'S ARGUMENT IS WITHOUT MERIT BECAUSE PETITIONER'S PROPOSED INTERPRETATION OF 28 U.S.C. § 1738 and 42 U.S.C. § 1983 CONTRAVENE BOTH PUBLIC POLICY AND THE LEGISLATIVE INTENT OF CONGRESS TO PRECLUDE JUDICIAL REVIEW ABSENT ABUSE OF PROCESS.

This Court in *Allen* v. *McCurry*, 499 U.S. 90, 101 S. Ct. 411 (1980), held that the preclusion rule emanating from the full faith and credit clause of the United States Constitution, U. S. Const. art IV, § 1, applies to § 1983 litigation.

The implementing legislation, § 1738, applies to both federal and state courts. Preclusion effect will be withheld from state court decisions only in the event the state court has evidenced an unwillingness or inability to protect the claimant's federal rights. This allows redress in the event of inferior state remedies.

The *Allen* court acknowledged the competing considerations arising out of a strong congressional concern that the state courts were not sufficiently dedicated to the protection of federal rights and a congressional desire to allow wronged parties a *de novo* trial. However, it indicated that in order for § 1983 to override the doctrine of preclusion advanced in § 1738, there must be "some affirmative showing" of a "clear and manifest" intent to override § 1738.

This court specifically rejected the ". . . generally framed principle that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court . . ." *Supra* at 101 S. Ct. 419.

The thrust of petitioner's argument is that unappealed arbitration awards may not be given preclusive effect since they are not *state court decisions*. It ignores, however, the language within § 1738 which requires ". . . federal courts to give preclusion effect to state court judgments whenever the courts of the state from which the judgments emerge would do so". *Id.* at 101 S. Ct. 415.

Michigan courts give preclusive effect to labor arbitration awards; and they may not be impeached even if there are erroneous findings of fact, erroneous rulings, or errors of law for the reason that the contractual element is present in the award. An error of law will render the award void only if it requires the parties to do an illegal act or violate a positive mandate of the law. *Fraser* v. *Ford Motor Co.*, 364 Mich. 648; 112 N.W.2d 80 (1961).

The underlying rationale for this holding is that the parties agreed to resolve their disputes by arbitration and they specifically agreed to be bound by the decision. Absent fraud or mistake, a claimant cannot reject the scope of the agreement. *Stowe* v. *Mutual Home Builders Corp.*, 252 Mich. 492; 233 N.W. 391 (1930).

In Michigan, the petitioner could have proceeded to have the arbitration award vacated. He chose not to do so. In the absence of pursuing his appellate remedy, the arbitration award becomes final and not subject to collateral attack. The arbitrator has effected the contractual intent of the parties.

The order of the Sixth Circuit Court of Appeals filed April 19, 1983, evidenced proper review of this case applying the preclusion doctrine. The judges reviewed the case in its entirety and all concluded that the petitioner's § 1983 suit was an attempt to relitigate the reason for his dismissal and vacate the arbitration award.

The only remaining question is whether or not claimant suffered an abuse of process. The Sixth Circuit found there was none.

Having concluded that the First Amendment issue was a subterfuge to retry the arbitration, the appellate court had no authority, absent abuse of process, to withhold preclusion effect to the arbitration finding. It must give the same preclusion effect to the arbitration award that the courts of the state from which it emerged would. The facts litigated at trial were identical to the facts which were, or could have been, litigated at arbitration.

The public policy argument for the federal courts absenting themselves from cases where there are recognizable arbitration standards subject to judicially supervised constitutional limits is compelling. Allowing collateral attack on arbitration decisions in which the state has a compelling interest is not consistent with the legislative intent of Congress and interferes in the legitimate areas of state responsibility.

Petitioner, in attempting to support his argument that preclusion effect may not be given to arbitration awards, relies heavily on this Court's language in *Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461; 102 S. Ct. 1883; *reh. denied*, 103 S. Ct. 20 (1982).

Interestingly enough, however, *Kremer* holds that a federal district court is required under § 1738 to give preclusion effect to a state court decision upholding an

administrative agency's rejection of an employment discrimination claim. Additionally, petitioner is precluded from litigating the same grievance in a federal court when under the laws of the state of New York petitioner could not raise the same grievance in the courts of New York.

Thus, § 1738 prevails and the historic respect of the federal court for state court judgments remains intact.

Petitioner argues that this Court's decision in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36; 94 S. Ct. 1011; 37 L. Ed.2d 147 (1974) should control in this case alluding to the language that any private arbitrator's decision which purports to resolve a Title VII complaint will not bar subsequent suit in federal court. Respondents disagree.

The petition for writ of certiorari was granted in *Gardner-Denver*, a Title VII case, to discuss the weight, if any, to be given to overlapping decisions that one forum must give to a determination in another. Title VII cases are unique in that a claimant has at least four forums in which to process his claim. The claimant may look to the state for relief via a state administrative agency, a state court, EEOC, and, finally, a federal court.

The decision spoke to the merits of the doctrine of preclusion as applied to administrative and arbitration hearings while recognizing that the ultimate responsibility for the protection of a claimant's federal rights rests in the federal courts.

Indeed, this Court indicated that where a competent arbitrator presides over a hearing in a procedurally fair manner and develops an adequate record regarding discrimination, the arbitration findings are accorded great weight. *Id.* at 415 U.S. 60, n. 21.

If the arbitration award is subject to judicial review and the state courts may apply *res judicata* and collateral estoppel principles, it takes no great leap of logic to assume that an arbitration decision could deserve preclusive effect.

What the court said in *Alexander* v. *Gardner-Denver Co., supra,* regarding arbitration is that the federal policy which favors arbitration may not be interpreted to mean that an arbitrator's resolution of a contractual claim disposes of a statutory claim under Title VII. *Id.* at 1019, n. 6. It concluded that federal policy in favor of arbitration and against discriminatory practices can best be accomplished by allowing the employee to pursue both the grievance procedure and his cause of action under Title VII.

The *Gardner-Denver* court also spoke to the election of remedies problem acknowledging that unless the Title VII federal enforcement proceedings mesh with the state proceedings there will be an incentive by the claimant to abandon state proceedings and concentrate on the federal remedy. This would appear to fly in the face of the concept that Title VII is designed to supplement, rather than supplant, existing laws and institutions of the state to protect against employment discrimination. *Supra* at 415 U.S. 48-49.

Respondents submit that no such issues entered into this case.

The arbitration dealt with whether or not the City of West Branch had "just cause" to fire petitioner. The arbitrator, after a "judicial type" hearing said it did on the basis of the "Dack incident". No constitutional issues were raised either before or at arbitration. Petitioner instituted his First Amendment suit after the arbitrator's decision was adverse to him.

In his federal suit, he complained that his discharge as a police officer was in retaliation for expressing his First Amendment rights to freedom of speech and assembly as well as a claim that the discharge procedure denied him due process under the 14th Amendment.

The arbitration proceeding was not used by petitioner for resolving his civil rights claim.

A review of the special interrogatory form reveals that the jury found that petitioner was discharged from his position as police chief in retaliation for, or to suppress, his union activity, whereas, the arbitrator found the petitioner was discharged for the "Dack incident".

The identical issue was raised in both forums. Under the doctrine of *res judicata* and collateral estoppel, the jury should have been foreclosed from passing on this issue. Since they found there were no due process violations, a judgment notwithstanding the verdict should have been entered by the trial court.

On review, the Sixth Circuit Court of Appeals applied the doctrine of preclusion and, having found no evidence of an unwillingness or inability on the part of the state to protect the claimant's federal rights, reversed the judgment of the lower court as to the defendant Longstreet.

This suit is not unlike *Smith* v. *Dawes*, 614 F.2d 1069 (5th Cir. 1980), wherein the plaintiff-employee appealed the district court grant of a summary judgment dismissing her suit for wrongful discharge.

In *Smith*, the bargaining agreement had a clause for binding arbitration. A hearing was held, and the arbitrator ruled that under the applicable regulations, the plaintiff's discharge was for just cause. Plaintiff then

brought a suit on a breach of the bargaining contract, 39 U.S.C. § 1208 (b), contending that her discharge for the reasons given by the arbitrator was in breach of the collective bargaining agreement. She asked the court to determine whether the arbitrator's decision was so erroneous that it was arbitrary and capricious. The appellate court, in affirming the judgment of the lower court, said:

> "Having availed herself of the grievance procedures of the collective bargaining contract, the plaintiff-employee is likewise subject to the contract provision that the arbitrator's decision is final and binding." *Supra* at 1073.

In footnoting its opinion, the court stated that it did not interpret the lower court's reasoning in granting its summary judgment as holding it had no jurisdiction to entertain a litigation, but that its essential holding was that there was no genuine issue of law or fact because the arbitrator's decision was final and binding. *Id.* at 1070.

This case, being devoid of a constitutional rights issue in the first instance, is subject to the mandate of 28 U.S.C. § 1738.

II.

THERE IS NO CONFLICT OF DECISIONS ON THE ISSUE PRESENTED IN THE PETITION.

Petitioner seeks a grant of writ of certiorari on the grounds that the decision in this matter is in conflict with four courts of appeals which have decided that state administrative determinations — and a fortiorari arbitration award — should not be given preclusive effect.

The cases cited by petitioner for the proposition all deal with civil rights issues raised in the initial grievance in a § 1983 action or are cases brought under other reconstruction civil rights acts.

Kremer, supra, was an employment discrimination claim heard before an administrative agency.

Moore v. *Bonner,* 695 F.2d 799 (4th Cir. 1982) was a civil rights action brought by a teacher as a result of defendant's decision not to renew her contract.

James v. *Board of Education,* 461 F.2d 566 (2d Cir.) *cert. den.,* 409 U.S. 1042 (1972), was a complaint under § 1983 alleging violation of the plaintiff's civil right to wear a black armband in class.

New Jersey-Philadelphia Presbytery of the Bible Presbyterian Church v. *New Jersey State Board of Higher Education,* 654 F.2d 868 (3d Cir. 1981) involved a federal suit by non-parties to a state enforcement proceeding advancing independent constitutional rights.

In *Patsy* v. *Florida International University,* 634 F.2d 900 (5th Cir.) (en banc), *rev'd on other grounds;* 102 S. Ct. 2557 (1982), the suit was in the nature of a civil rights action brought by the employee, Patsy, against the University alleging sex and racial discrimination.

Interestingly enough, in *Patsy,* the appellate court held that the civil rights suit may be dismissed for failure to exhaust administrative remedies before the § 1983 action is brought in federal court, absent the traditional exceptions to general exhaustion of remedies rule. Citing *McKart* v. *United States,* 395 U.S. 185; 89 S. Ct. 1657; 23 L. Ed.2d 194 (1969).

None of these cases deal with an administrative decision or an arbitration award in a non-civil rights case.

A valid and final arbitration award has the same effect for purposes of claim preclusion as a court judgment. Restatement of the Law of Judgments, 2d, § 84 (1).

The Restatement of the Law of Judgments, 2d, § 27, states that:

> "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim."

This preclusion applies not only to an opposing party but also applies to any other person unless there is evidence that the litigant lacked a full and fair opportunity to litigate the issue in the first action, or he presents circumstances which justify him an opportunity to relitigate the issue. Restatement of the Law of Judgments, 2d, § 29.

In summary, it is apparent that the alleged conflict presented by petitioner is, at best, illusory.

In order to create a conflict, the petitioner has relied exclusively on the federal courts' interpretation of the preclusion doctrine as it relates to Title VII cases.

All of the cases cited by the petitioner have at their very foundation a federal right which was proclaimed by the asserting party in the first instance. Thus, this case is factually distinguishable from the cases cited.

There is no public policy reason or documented congressional intent to override § 1738 by enactment of § 1983. Rather, *Allen* v. *McCurry*, *supra*, suggests that the courts and Congress wish to defer to state court authority whenever such deference does not undermine procedural fairness.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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